Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

(3)

No. 95-198

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM DAUBERT and JOYCE DAUBERT, individually and as guardians ad litem for JASON DAUBERT, and ANITA DE YOUNG, individually and as guardian ad litem for ERIC SCHULLER,
Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

This case was in this Court two Terms ago on the issue of the standards governing the admissibility of expert scientific testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). The Ninth Circuit held on remand that petitioners' proffered expert testimony, which was essential to their case, was not admissible (Pet. App. A1-A19), and petitioners do not challenge that ruling. They now seek review on a new and different ground, involving the standards governing summary judgment. They do not contend that the evidence before the district court on summary judgment actually creates a genuine issue of material fact (Fed. R. Civ. P. 56(c)); nor do they contend that they lacked sufficient opportunity to generate and present evidence

that would create such a genuine factual dispute. Rather, their sole claim is that summary judgment should have been denied on the ground (not even raised until after this Court's remand of the case to the Ninth Circuit) that respondent failed to meet its initial pleading burden as the party moving for summary judgment. That claim lacks factual and legal merit and does not warrant review. The petition should be denied and the case finally brought to an end.[1]

STATEMENT

1. Petitioners filed state-law damages actions in 1984 asserting that Merrell Dow's morning-sickness drug, Bendectin, was the cause of the birth defects (limb reduction) suffered by Jason Daubert and Eric Schuller. After removal (and initial transfer to the Bendectin multidistrict proceeding in the Southern District of Ohio), the cases proceeded in the Southern District of California beginning in 1985 and were consolidated in 1987. Extensive discovery took place in the years before 1989. During that process, petitioners gave notice that they would rely on essentially the same group of proffered scientific experts who had testified for plaintiffs in the numerous other Bendectin cases on the identical issue of whether Bendectin caused their birth defects.[2]

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[1] Pursuant to Rule 29.1 of the Rules of this Court, respondent states that it is a wholly owned subsidiary of Hoechst Marion Roussel, Inc. (formerly Marion Merrell Dow Inc.), which is wholly owned by Hoechst Corporation, which in turn is wholly owned by Hoechst AG. Respondent has four foreign subsidiaries in which it owns less than all the stock: Marion Merrell Dow S.A. (France); Gruppo Lepetit S.p.A.; Marion Merrell Dow S.p.A. (Spain); and Marion Merrell Dow K.K.

[2] The leading federal court-of-appeals decisions at that time—all of which held that there was no sufficient admissible evidence of causation—were *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (5th Cir.), *modified*, 884 F.2d 166 (5th Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882

On August 3, 1989, Merrell Dow filed its motion for summary judgment, contending (as this Court described it) "that Bendectin does not cause birth defects in humans and that petitioners would be unable to come forward with any admissible evidence that it does." *Daubert*, 113 S. Ct. at 2791. The motion attached a number of exhibits, including an affidavit from Dr. Steven Lamm attesting to the fact that of "more than 30 published studies involving over 130,000 patients[,] [n]o study had found Bendectin to be a human teratogen" (that is, a substance causing birth defects). *Id.* at 2791. As this Court observed, "[p]etitioners did not (and do not) contest this characterization of the published record regarding Bendectin." *Ibid.*

Merrell Dow's motion hardly stopped at Dr. Lamm's affidavit. Rather, the motion discussed the theory of causation to be advanced by petitioners' proposed experts, as evinced in the only sources then available (no expert affidavits or reports having yet been submitted by petitioners), namely, depositions and repeated testimony in other Bendectin cases. *See, e.g.*, note 2, *supra*, and note 3, *infra*. The motion, in addition to attaching various exhibits that displayed, discussed, and criticized the plaintiffs' causation theory, explained why the causation testimony of petitioners' experts would not be sufficient for petitioners to carry their burden of proving causation by admissible evidence.[3]

(1989); and *Lynch v. Merrell-Nat'l Lab.*, 830 F.2d 1190 (1st Cir. 1987).

The views about Bendectin held by essentially all of petitioners' experts had been before the courts in those cases, either through trial testimony or depositions (as well as in other cases): *e.g.*, Dr. Crescitelli in *Richardson*, *Brock*, and *Lynch*; Dr. Newman in *Richardson*, *Brock*, and *Lynch*; Dr. Swan in *Richardson* and *Lynch*; Dr. Gross in *Richardson*; Dr. Glasser in *Brock*; and Dr. Done in *Richardson* and *Lynch*.

[3] The exhibits to Merrell Dow's motion were as follows: Dr. Lamm's statement (Exhibit A); petitioners' motion to compel dis-

Petitioners had "substitute[d] Dr. Palmer for Dr. Done as their primary expert on the issue of causation," asserting that no prejudice would result to Merrell Dow because Dr. Palmer's opinion was based on the same evidence as that of Dr. Done. SJ Mot., Exh. B at 9, 5. Merrell Dow's motion pointed out that this one new expert witness was relying on the same evidence as the evidence rejected in *Lynch*, *Richardson*, and *Brock*. Merrell Dow detailed the types of evidence relied on in the repeated expert testimony of Bendectin plaintiffs' experts (chemical structure analysis, *in vitro* studies, *in vivo* studies, epidemiology reanalysis) and the reasons—as set forth in the quoted *Lynch*, *Richardson*, and *Brock* decisions, as well as in the exhibits[4]—that the proffered evidence was inadequate. SJ Mot. at 6-9, 10-11, 13-15, 17-23. The specific reasons why the anticipated expert causation evidence was inadequate to withstand the motion for summary judgment were thus explained in detail to the district court.[5]

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covery and allow substitution of Dr. Palmer for Dr. Done (Exhibit B); excerpt of deposition of Dr. Palmer (Exhibit C); excerpt from district court's ruling in *Heath v. Merrell Dow Pharmaceuticals, Inc.*, No. C 81-4362 (N.D. Cal. July 5, 1988) (Exhibit D); opinion in *DePyper v. Navarro*, No. 83-303-467 (Mich. Cir. Ct. Mar. 10, 1989) (Exhibit E); opinion in *Koller v. Richardson-Merrell, Inc.*, No. 80-1258 (D.D.C. June 30, 1989) (Exhibit F); opinion in *Ambrosini v. Richardson-Merrell, Inc.*, No. 86-278 (D.D.C. June 30, 1989) (Exhibit G); opinion in *DeLuca v. Merrell Dow Pharmaceuticals*, No. 87-226 (D.N.J. June 7, 1989) (Exhibit H); opinion in *Monahan v. Merrell-Nat'l Labs.*, No. 83-3108 (D.Mass. Dec. 18, 1987) (Exhibit I).

[4] As to the federal circuit-court decisions, see note 2, *supra*. As to the exhibits: the *DePyper* court, for example, extensively discussed the testimony of Dr. Done, Dr. Swan, and Dr. Glasser (S.J. Mot., Exh. E), and *Koller*, *Ambrosini*, and *DeLuca* each discussed the testimony of Dr. Done, the primary Bendectin plaintiffs' expert at the time (SJ Mot., Exh. F, G, H).

[5] The Ninth Circuit was subsequently to note that other courts in other Bendectin cases had discredited Dr. Done's methodology

In their response (filed Aug. 21, 1989), petitioners made no suggestion that the showing made by Merrell Dow in its motion was insufficient to require a response on the merits of the question whether a material disputed fact existed.[6] Nor did petitioners dispute Merrell Dow's premise that their expert testimony was materially the same as the testimony of plaintiffs' experts in other Bendectin cases. Rather, petitioners directly addressed the merits of Merrell Dow's attack on that testimony and argued that the other judicial decisions were incorrect and that their expert evidence *was* adequate. Opp. to SJ Mot. at 1-27. And petitioners attached 43 exhibits to their opposition, consisting of, among other things, extensive excerpts from testimony of various experts in other cases, published literature on Bendectin and teratology, synopses of decisions and of epidemiological studies, and other materials.

Merrell Dow filed a reply brief (on August 28, 1989) that again explained why the causation opinions of petitioners' experts—including Drs. Done, Newman, Swan, Glasser, Thiersch, and Crescitelli—did not create a triable issue (Def. Reply at 4-10), adding as an attachment a transcript of a deposition of Dr. Glasser in another Bendectin case. Then, in late September 1989, petitioners filed affidavits from their several experts. On October 3, 1989, Merrell Dow filed a reply noting that there was nothing new in the experts' affidavits and describing the deficiencies in their causation opinions as revealed in the several judicial opinions that had already analyzed them

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as "demonstrably faulty" (Pet. App. A16 n.14, citing *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 791 F. Supp. 1042 (D.N.J. 1992), *aff'd*, 6 F.3d 778 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994)) and Dr. Palmer's testimony as having " 'no understandable scientific basis' " (Pet. App. A14, quoting *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (6th Cir.), *cert. denied*, 113 S. Ct. 84 (1992)).

[6] In particular, petitioners did not argue that, if the admissibility standards urged by Merrell Dow were adopted, Dr. Lamm's affidavit would be inadmissible and Merrell Dow's motion would then fail to meet Rule 56 standards.

and found them wanting. Def. Reply to Aff. at 2-5. Merrell Dow also attached the August 1989 report by a scientific committee appointed by the Canadian government, which exhaustively reviewed the available evidence on Bendectin, including the types of evidence featured by petitioners' experts, and concluded that "[t]here has been no prescription drug that has been more extensively studied for reproductive toxicity," that "the prescribing of Bendectin to a human population presents no measurable reproductive risks to that population," and that "[i]t would be a disservice to Canadian women to withdraw this drug from the market." Def. Reply to Aff., Exh. J, at 1, 4.

2. The district court granted Merrell Dow's motion for summary judgment on November 1, 1989. Pet. App. A46-A55. Not surprisingly, given that petitioners made no argument that Merrell Dow had failed to meet its initial burden sufficiently to join issue on the merits of summary judgment, the district court directly addressed the merits, quoting and applying the standard set forth by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986): "Summary judgment is proper 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " Pet. App. A47 (quoting *Celotex*, 477 U.S. at 322). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Here, causation was an essential element of petitioners' case, and so summary judgment was proper unless the record showed that petitioners had sufficient admissible evidence to prove causation. The district court reviewed the evidence of petitioners' experts, which was no different from that held inadequate in *Brock*, *Richardson*, *Lynch*, and other decisions, and ruled that petitioners lacked sufficient admissible evidence to withstand summary judgment. Pet. App. A48-A55.

3. On appeal, petitioners made no claim that summary judgment should have been denied because of some

failure by Merrell Dow to meet its initial burden to join issue on the merits of the summary-judgment question whether a material disputed fact exists. Petitioners did not even cite *Celotex*. Rather, petitioners directly, and exclusively, challenged the merits of the district court's conclusion that they lacked sufficient admissible evidence of causation. *See* Appellants' Opening Brief in Ct. App. at 1 (issues presented; standard of review); *id.* at 17-50; Appellants' Reply Brief in Ct. App. at 1-25.

The Ninth Circuit affirmed, applying *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), to hold that the scientific evidence proffered by petitioners was inadmissible. Pet. App. A40-A41. Petitioners sought rehearing on the merits of the inadmissibility ruling. Again they did not mention any issue concerning a moving party's initial burden on summary judgment or cite *Celotex*. *See* Petitions for Rehearing and Rehearing *En Banc* (filed Jan. 2, 1992).

4. This Court subsequently granted certiorari and vacated the Ninth Circuit decision. *Daubert*, 113 S. Ct. 2786; Pet. App. A21. The Court held that *Frye* had been superseded by the Federal Rules of Evidence (113 S. Ct. at 2792-94) and then construed the Rules as requiring that proffered scientific expert testimony meet prescribed tests of reliability and relevance before being admitted (*id.* at 2794-99). The Court remanded the case to the Ninth Circuit for further proceedings. *Id.* at 2799.

5. On remand, Merrell Dow filed a motion for leave to file a supplemental brief that would urge the Ninth Circuit to affirm the summary judgment in Merrell Dow's favor without need for a further remand to the district court. Petitioners opposed the motion, arguing that no supplemental briefing was needed for the court of appeals to conclude that the case should be remanded to the district court. As part of that argument, petitioners now advanced the contention that summary judgment had to be denied because "the single affidavit that Merrell presented to the District Court in support of its motion

[Dr. Lamm's affidavit] is inadmissible." Opp. of Plaintiffs-Appellants to Motion for Leave to File Supplemental Brief on Remand at 6 (filed July 29, 1993); *id.* at 9 ("Merrell submitted no other admissible evidence on causation; therefore, summary judgment is improper").

The Ninth Circuit permitted supplemental briefing. Merrell Dow filed a brief arguing that, under the admissibility standards articulated by this Court, petitioners lacked sufficient admissible evidence of causation. Supplemental Brief on Remand of Appellee Merrell Dow Pharmaceuticals Inc. (filed Aug. 20, 1993). Petitioners responded on the admissibility issue and also argued that "because Dr. Lamm's affidavit is inadmissible under *Daubert*, Merrell failed to meet its threshold Rule 56(c) burden to demonstrate—based solely on the pleadings, depositions, interrogatory answers, admissions and/or affidavits in the case —the absence of any genuine issue as to causation." Supplemental Brief on Remand of Plaintiffs-Appellants at 6 (filed Sept. 7, 1993).

The Ninth Circuit rejected this argument, as well as petitioners' arguments (not renewed here) for the admissibility of their experts' testimony, and reaffirmed the grant of summary judgment against petitioners. Pet. App. A1-A19. With respect to the new Rule 56 argument, the Ninth Circuit faulted petitioners on two grounds. First, as a factual matter, petitioners "fail to mention the many other exhibits offered by Merrell." Pet. App. A5. Second, as a legal matter, petitioners' theory of Rule 56 was incorrect: "[b]ecause [petitioners] bear the ultimate burden of proof on causation, Merrell had only to point to the absence of a genuine issue of material fact; it wasn't required to produce any evidence at all." *Ibid.* The court then turned to the merits of the summary-judgment and admissibility questions and concluded—what is no longer in dispute—that the record in fact creates no genuine issue of material fact on causation, an essential element of petitioners' case, because petitioners' proffered expert testimony failed the test of

scientific validity and "fit." *Id.* at A6-A19. The Ninth Circuit subsequently denied petitioners' request for panel and *en banc* rehearing. *Id.* at A56.

REASONS FOR DENYING THE PETITION

Petitioners seek review on the sole ground that the Ninth Circuit has established some lesser burden than have the Eleventh, Fifth, Seventh, and Tenth Circuits for the initial showing that must be made by a party moving for summary judgment on an issue as to which the non-moving party bears the burden of proof. This Court denied certiorari last year on the identical issue and a similar record in *Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1299 (1994), where other Bendectin plaintiffs accused the Sixth Circuit of precisely the same misstep. But the issue is no more worthy of review in this case, and the characterizations of the pertinent circuit-court decisions no more accurate, than in *Elkins*.

Even in general, there is no reason to believe that there are any meaningful, outcome-determinative differences in actual standards on the Rule 56(c) point of pleading raised by petitioners. Nor is there reason to think that any superficial case-by-case variations in judicial language on the point require or are even susceptible of a judicial resolution by this Court. Indeed, it is not clear what new interpretation this Court could usefully announce, beyond what it stated in *Celotex*, that would eliminate the seemingly inevitable case-specific judgments needed to determine whether issue has been joined on summary judgment. As far as the petition reveals, and as far as we can tell, any shortage of judicial discussion or clarity on the " 'precise nature' " of the movant's burden (Pet. 7) is due to the inherently case-specific nature and general insignificance of the issue.[7]

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[7] Petitioners are unable to quote any court of appeals decision that states that it has a standard in meaningful conflict with the standards of another circuit. Moreover, petitioners cite to nothing in the leading treatises that identifies any significant dispute on

In any event, it is clear that the alleged conflict is patently illusory in this case. The Ninth Circuit simply did not reject any Rule 56 requirement that is imposed by other circuits or even by any formulation that petitioners offer here. Its decision is plainly correct under the law of this Court and of the circuits relied on by petitioners.

The Ninth Circuit first correctly observed that petitioners had ignored (as they still ignore in their petition here) all but one of the exhibits accompanying Merrell Dow's motion. The Ninth Circuit then made two legal points about the moving party's burden in cases where the ground for summary judgment is that the opposing party lacks sufficient evidence on an essential element that it must prove: what the moving party *need not* do is produce any evidence of its own; what the moving party *must* do is to "point to the absence of a genuine issue of material fact." Pet. App. A5. Both points are explicitly supported by this Court's decision in *Celotex*, 477 U.S. at 325: "we do not think . . . that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the non-moving party bears the burden of proof. Instead, . . . the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the non-moving party's case." [8]

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the nature of the moving party's initial burden when the ground for summary judgment is, as in *Celotex*, that the non-moving party lacks sufficient evidence to carry its burden of proof. *See* 10 & 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil 2d* §§ 2711-2728, 2738-39 (1983 & Supp. 1995); 6 *Moore's Federal Practice* ¶¶ 56.11, 56.15, 56.23 (2d ed. 1955). *See also* S. Baicker-McKee, W. Janssen, M. Berger, & J. Corr, *Federal Civil Rules Handbook* 539 (1995) (moving party's "prima facie burden is discharged simply by pointing out for the court an absence of evidence in support of the non-moving party's claims or defenses").

[8] *See also* 477 U.S. at 323 (movant "bears the initial responsibility of informing the district court of the basis for its motion, and

The Ninth Circuit's legal standards are entirely consistent with the standards in the circuits cited by petitioners. Petitioners' leading decisions from those circuits recognize, as did the Ninth Circuit, that the moving party need not produce affirmative evidence of its own; and petitioners seem no longer to be arguing otherwise, as they did in the Ninth Circuit. *See* Pet. 10-11 nn.17, 18 (Eleventh and Fifth Circuit decisions explicitly recognizing that production of evidence is only one alternative way for movant to meet burden). And the relied-upon circuits recognize that, while the movant must do more than merely "state" that the nonmoving party lacks essential evidence, the movant has carried its burden if it has "point[ed] to materials on file" to "show" or "demonstrate" the absence of essential evidence. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 n.19 (11th Cir. 1991) (en banc). *See Schaefer v. Gulf Coast Regional Blood Ctr.*, 10 F.3d 327, 330 (5th Cir. 1994) (movant "must inform the court of the basis for its motion and point out" the record materials that show the absence of essential evidence); *Schertz v. Waupaca Cty.*, 875 F.2d 578, 581 (7th Cir. 1989) (movants carry burden by "explaining the basis of their motion and calling the court's attention to the parts of the record" that they claim show lack of essential evidence); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993) (enough to "point[] to places in the record showing a lack of disputed fact").

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identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact"); *ibid.* ("regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied").

Petitioners have provided no reason to think that the law in the Ninth Circuit is any different. Certainly the Ninth Circuit nowhere said that all a moving party need do is nakedly " ' state,' " or make the unsupported "assertion," that the opposing party lacks sufficient evidence. Pet. 10 (quoting *Clark*), 9. What it did say is that a movant must "point to" the absence of a material dispute. Quite simply, there is no basis for reading that requirement to be any different from the standards in other circuits quoted above, which even use similar phrases—all themselves quite similar to this Court's own phrase in *Celotex*. 477 U.S. at 325 ("pointing out").[9]

If there is no conflict in overt pronouncements, there is likewise no conflict in holdings, for Merrell Dow plainly did more than simply "state" that petitioners could not prove causation. Even in its opening motion, Merrell Dow "showed" petitioners' evidentiary deficiency by explaining in detail, both in its own discussion and through the attached judicial opinions, the substance of the causation testimony of petitioners' expected experts and why it was scientifically inadequate. *See* pages 3-4, *supra*. That initial filing, all by itself, fulfilled the function of guiding both the court and the opposing party to the specific evidence, and specific criticisms, relevant to the issue of causation on which the motion was based. Nothing whatever in the other circuits' opinions cited by petitioners suggests that they would have found Merrell Dow's extensive demonstration inadequate. Thus, this

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[9] In *Elkins*, the petitioners' effort to manufacture a circuit-court conflict foundered on the fact that there was no reason to think that the Sixth Circuit had interpreted its catchy phrase "put up or shut up" to allow a movant to stop at the mere assertion, unsupported by demonstration, that the opposing party lacks crucial evidence. *See* Pet. 9. *Elkins* required the movant to "show," or "point out," the absence of a genuine issue of material fact. 8 F.3d at 1071. And even *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989), which first used the phrase "put up or shut up" as a shorthand, followed it with the requirement that the movant "point[] out" the lack of evidence. *Id.* at 1479.

case involves the furthest thing from a naked assertion of "put up or shut up" that requires the opposing party to do all the initial analytical work.

Moreover, the evidentiary material before the district court increased substantially when petitioners, in opposition, introduced volumes of testimony from other proceedings—whose admissibility against their sponsor is not disputed. The record expanded further when petitioners added their affidavits and when Merrell Dow added material in reply, including the exhaustive study of the available evidence by the Canadian government—likewise admissible. *See* pages 5-6, *supra*. At that point, wholly apart from Dr. Lamm's affidavit, there was affirmative admissible evidence supporting Merrell Dow's motion on causation. And that evidence could not be ignored: "[t]he court must consider the material submitted by both of the parties, of course." Wright, Miller, & Kane, *supra*, § 2721, at 44-46; *see Celotex*, 477 U.S. at 323 (summary judgment is to be based on "whatever is before the district court").

In short, when it came time for Merrell Dow's summary judgment motion, there was no doubt—and there later was no dispute—about the substance of petitioners' anticipated expert testimony on causation, as found in the deposition and trial testimony on this very issue in related Bendectin cases. Merrell Dow, in addition to introducing an affidavit attesting to the overwhelming mass of one-side published literature, then analyzed the substance of petitioners' expert testimony and explained, using the available judicial opinions, why that testimony failed to provide sufficient admissible evidence of causation. That demonstration—further supplemented by the material added to the record as the summary-judgment proceedings continued—did everything that Rule 56(c), *Celotex*, and even the circuit-court decisions favored by petitioners require. The Ninth Circuit's decision accord-

ingly is correct and does not conflict with any decision of this Court or of any other circuit court.[10]

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[10] Several alternatives grounds support the judgment of the Ninth Circuit on the Rule 56(c) issue. First, petitioners waived their present claim by failing to raise it in opposing summary judgment or on appeal from the grant of summary judgment; and petitioners cannot reasonably claim as an excuse that they could not anticipate the application of stringent admissibility standards to Dr. Lamm's affidavit, given the already extensive body of case law, cited throughout Merrell Dow's summary judgment motion, on the standards governing admission of scientific expert testimony. *See* notes 2, 6, *supra*. Accepting petitioners' argument now, after years of litigation, would produce an obvious unfairness and make little sense: petitioners' failure to raise this point in a timely manner deprived Merrell Dow of any opportunity it might have needed, under petitioners' theory of Rule 56, to correct any deficiencies in its filings while still in district court; and there is no dispute at this point in the litigation that petitoners' evidence in fact fails to create a genuine issue of material fact.

Second, and in any event, Dr. Lamm's affidavit is readily admissible, to prove the uniform published scientific analyses of Bendectin, under the now-accepted evidentiary standards applicable to this case: it reports on the results of peer-reviewed, published literature reflecting generally accepted findings; and it reflects work that he initiated, not for partisan purposes in litigation, but as a court-appointed expert in the original Bendectin multidistrict proceeding. That evidence is self-validating under the Rule 702 standards set forth by this Court and by the Ninth Circuit on remand. Moreover, as this Court observed in *Daubert*, 113 S. Ct. at 2791, "[p]etitioners did not (and do not) contest [Dr. Lamm's] characterization of the published record regarding Bendectin."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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